Health Care Reform
LEGISLATIVE BRIEF

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90-day Waiting Period Limit

For plan years beginning on or after Jan. 1, 2014, the Affordable Care Act (ACA) prohibits group health plans and group health insurance issuers from applying any waiting period that exceeds 90 days. This waiting period limit does not require an employer to offer coverage to any particular employee or class of employees, including part-time employees. It only prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage under a group health plan becomes effective.

On Feb. 20, 2014, the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (Departments) released final regulations on the 90-day waiting period limit. The final regulations apply for plan years beginning on or after Jan. 1, 2015. However, the 2013 proposed rules provided that the 90-day waiting period limit would apply for plan years beginning on or after Jan. 1, 2014. **Thus, for plan years beginning in 2014, the Departments will consider compliance with either the 2013 proposed rules or the final regulations to constitute compliance with the 90-day waiting period limit requirement**.

In conjunction with the final rule, the Departments released a separate proposed rule, which was finalized on June 23, 2014, regarding a new provision permitting **a reasonable and bona fide employment-based orientation period** of up to one month as a permissible eligibility condition. The finalized regulations apply to group health plans and group health insurance issuers for plan years beginning on or after Jan. 1, 2015. Until then, employers can comply with the proposed rule.

AFFECTED PLANS

ACA's 90-day waiting period limit applies to both non-grandfathered and grandfathered group health plans and health insurance coverage. However, it does not apply to HIPAA-excepted benefits, such as limited-scope dental or vision plans and certain health flexible spending accounts (FSAs).

The 90-day waiting period limit applies to both the plan and issuer offering coverage in connection with the plan. However, to the extent coverage under a group health plan is insured by a health insurance issuer, the final regulations provide that the issuer can rely on the eligibility information reported to it by an employer (or other plan sponsor). The issuer will not violate the 90-day waiting period limit requirements if it:

- Requires the plan sponsor to make a representation regarding the terms of any eligibility conditions or waiting periods imposed by the plan sponsor before an individual is eligible for coverage under the terms of the plan (and update this representation with any applicable changes); and
- Has no specific knowledge of the imposition of a waiting period that would exceed the permitted 90-day period.

OVERVIEW OF THE 90-DAY WAITING PERIOD LIMIT

A waiting period is the period of time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll in the plan becomes effective. An employee or dependent is otherwise eligible for coverage when he or she has met the plan's substantive eligibility conditions.

Under the ACA, a group health plan, and a health insurance issuer offering group health insurance coverage, may not apply a waiting period that exceeds 90 days. Thus, after an individual is determined to be otherwise eligible for

coverage under the terms of the plan, any waiting period may not extend beyond 90 days. All calendar days are counted beginning on the enrollment date, including weekends and holidays.

However, the ACA does not:

- Require a plan or issuer to have any waiting period at all; or
- Prevent a plan or issuer from having a waiting period that is shorter than 90 days.

If, under the terms of the plan, an individual can elect coverage that becomes effective on a date that does not exceed 90 days, the coverage complies with the 90-day waiting period limit. Thus, a plan or issuer does not violate ACA merely because employees take additional time to elect coverage.

In addition, if an individual enrolls as a late enrollee or special enrollee, any period before the individual's late or special enrollment is not a waiting period. The effective date of coverage for special enrollees is set forth in the 2004 HIPAA regulations governing special enrollment (and, if applicable, in HHS regulations addressing guaranteed availability).

COUNTING DAYS

Under the final regulations, the waiting period may not extend beyond 90 days, and all calendar days must be counted beginning on the enrollment date, including weekends and holidays. For a plan with a waiting period, the enrollment date is the first day of the waiting period.

If a plan or issuer imposes a 90-day waiting period and the 91st day is a weekend or holiday, the plan or issuer may choose to make coverage effective earlier than the 91st day for administrative convenience. Similarly, plans and issuers that do not want to start coverage in the middle of a month (or pay period) may choose to make coverage effective earlier than the 91st day for administrative convenience. For example, a plan may impose a waiting period of 60 days plus a fraction of a month (or pay period) until the first day of the next month (or pay period), as long as the waiting period does not extend beyond 90 days.

However, a plan or issuer may not make the effective date of coverage later than the 91st day. Thus, for example, a plan or issuer generally cannot wait until the first of month after the 90-day waiting period ends to make coverage effective.

OTHER PERMITTED ELIGIBILITY CONDITIONS

Under ACA, eligibility conditions that are based solely on the lapse of time are permissible for no more than 90 days. However, other eligibility conditions that are not based solely on the lapse of time are generally allowed, unless the condition is designed to avoid compliance with the 90-day waiting period limit.

The 2013 proposed regulations included the following examples of permissible eligibility conditions:

- Being in an eligible job classification; or
- Achieving job-related licensure requirements specified in the plan's terms.

Reasonable and Bona Fide Employment-based Orientation Periods

The final rules add a third example of permissible eligibility conditions, permitting the satisfaction of **a reasonable and bona fide employment-based orientation period**. Under the final regulations, a requirement to successfully complete a reasonable and bona fide employment-based orientation period may be imposed as a condition for eligibility for coverage under a plan. During an orientation period, an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin.

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The final regulations do not specify the circumstances under which the duration of an orientation period would not be considered "reasonable or bona fide." However, separate final regulations specify **one month as the maximum length** of any orientation period. The one-month limit is intended to avoid abuse and facilitate compliance with the waiting period restrictions.

The Departments stated that orientation periods are commonplace and they do not intend to call into the question the reasonableness of short, bona fide orientation periods. However, to ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month.

For any period longer than one month that precedes a waiting period, the Departments refer back to the general rule, which provides that the 90-day period begins after an individual is otherwise eligible to enroll under the terms of a group health plan. While a plan may impose substantive eligibility criteria, such as requiring the worker to fit within an eligible job classification or to achieve job-related licensure requirements, it may not impose conditions that are mere subterfuges for the passage of time.

Measuring the One-month Orientation Period

This one-month maximum is generally a period that begins on any day of a calendar month, and would be determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is Oct. 1, the last permitted day of the orientation period is Oct. 31.

If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the employee's start date is Jan. 30, the last permitted day of the orientation period is Feb. 28 (or Feb. 29 in a leap year). Similarly, if the employee's start date is Aug. 31, the last permitted day of the orientation period is Sept. 30.

If a group health plan conditions eligibility on completing a reasonable and bona fide employment-based orientation period, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limit if:

- The orientation period did not exceed one month; and
- The maximum 90-day waiting period would begin on the first day after the orientation period.

Example

Facts: Employee H begins working full time for Employer Z on Oct. 16. Z sponsors a group health plan, under which full-time employees are eligible for coverage after they have successfully completed a bona fide one-month orientation period. H completes the orientation period on Nov. 15.

Conclusion: In this example, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than Feb. 14, which is the 91st day after H completes the orientation period.

If the orientation period was longer than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly, it would violate the waiting period regulations.

Employer Shared Responsibility Rules

Employers should note that compliance with the final orientation period regulations does not constitute compliance with the ACA's employer shared responsibility provisions (Code Section 4980H). Under the employer shared

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responsibility rules, an applicable large employer (ALE) may be subject to penalties if it fails to offer affordable minimum-value coverage to certain newly hired full-time employees by the first day of the fourth full calendar month of employment.

An ALE that has a one-month orientation period may comply with the waiting period limits and avoid Section 4980H penalties by offering coverage no later than the first day of the fourth full calendar month of employment. However, an ALE plan may not be able to impose the full one-month orientation period and the full 90-day waiting period without potentially becoming subject to a Code Section 4980H penalty.

For example, if an employee is hired as a full-time employee on Jan. 6, a plan may offer coverage May 1 and comply with both provisions. However, if the employer is an ALE and starts coverage May 6, which is one month plus 90 days after date of hire, the employer may be subject to penalty under Code Section 4980H.

Cumulative Hours-of-Service Requirement

Under the final regulations, if a group health plan or group health insurance issuer conditions eligibility on any employee's (part-time or full-time) having completed a number of cumulative hours of service, the eligibility condition does not violate ACA's 90-day limit on waiting periods if the cumulative hours-of-service requirement does not exceed **1,200 hours**.

The plan's waiting period must begin on the first day after the employee satisfies the plan's cumulative hours-of-service requirement and may not exceed 90 days. Also, this provision is designed to be a one-time eligibility requirement only. The final regulations do not permit a plan or issuer to reapply the hours-of-service requirement to the same individual each year.

Variable-Hour Employees

Under the final regulations, a special rule applies if a group health plan conditions eligibility on an employee regularly working a specified number of hours per pay period (or working full time), and it cannot be determined that a newly hired employee is reasonably expected to regularly work that number of hours per period (or work full time).

In this type of situation, the plan may take a reasonable period of time, not to exceed 12 months and beginning on any date between the employee's start date and the first day of the first calendar month following the employee's start date, to determine whether the employee meets the plan's eligibility condition. This may include a measurement period of no more than 12 months that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date. This is consistent with the timeframe permitted for these determinations under the employer shared responsibility provisions.

The time period for determining whether a variable-hour employee meets the plan's hours of service eligibility condition will comply with ACA's 90-day waiting period limit if coverage is made effective no later than 13 months from the employee's start date, except where a waiting period that exceeds 90 days is imposed in addition to the measurement period. If an employee's start date is not the first of the month, the time period can also include the time remaining until the first day of the next calendar month.

INDIVIDUALS IN A WAITING PERIOD PRIOR TO EFFECTIVE DATE

Under the ACA, the 90-day waiting period limit is effective for plan years beginning on or after Jan. 1, 2014. The 2013 proposed rule stated that, with respect to individuals who are in a waiting period for coverage before Jan. 1, 2014, the waiting period can no longer apply to the individual if it would exceed 90 days. This is the case even if the waiting period began before the first day the rules apply to the plan.

EMPLOYEES THAT ARE REHIRED OR CHANGE JOB CLASSIFICATIONS

The final regulations provide that a former employee who is rehired may be treated as newly eligible for coverage upon rehire. Therefore, a plan or issuer may require that individual to meet the plan's eligibility criteria and to satisfy

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the plan's waiting period anew, if reasonable under the circumstances. The requirement would not be reasonable if the termination and rehire is a subterfuge to avoid compliance with the 90-day waiting period limit.

The same analysis would apply to an individual who moves to a job classification that is ineligible for coverage under the plan, but then later moves back to an eligible job classification.

APPLICATION TO MULTIEMPLOYER PLANS

The Departments recognize that multiemployer plans maintained pursuant to collective bargaining agreements have unique operating structures and may include different eligibility conditions based on the participating employer's industry or the employee's occupation. For example, some multiemployer plans determine eligibility based on complex formulas for earnings and residuals or use "hours banks" in which workers' excess hours from one measurement period are credited against any shortage of hours in a succeeding measurement period, functioning as buy-in provisions to prevent lapses in coverage.

On Sept. 4, 2013, the Departments issued an FAQ on the 90-day waiting period limit as applied to multiemployer plans. This FAQ reiterates that, to the extent plans and issuers impose substantive eligibility requirements not based solely on the lapse of time, these eligibility provisions are permitted if they are not designed to avoid compliance with the 90-day waiting period limitation.

Therefore, for example, if a multiemployer plan operating pursuant to an arms-length collective bargaining agreement has an eligibility provision that allows employees to become eligible for coverage by working hours of covered employment across multiple contributing employers (which often aggregates hours by calendar quarter and then permits coverage to extend for the next full calendar quarter, regardless of whether an employee has terminated employment), the Departments would consider that provision designed to accommodate a unique operating structure (and, therefore, not designed to avoid compliance with the 90-day waiting period limitation).

EFFECTIVE DATE

Under the ACA, the 90-day waiting period limit applies for plan years beginning on or after Jan. 1, 2014, for both grandfathered and non-grandfathered group health plans and health insurance issuers offering group health insurance coverage. The Departments stated that that group health plans and health insurance issuers may rely on the 2013 proposed rule through at least the end of 2014. Thus, the Departments would consider compliance with the proposed regulations to constitute compliance with the 90-day waiting period limit at least through the end of 2014.

The final regulations apply to group health plans and group health insurance issuers for plan years beginning on or after Jan. 1, 2015. For plan years beginning in 2014, the Departments will consider compliance with either the 2013 proposed regulations or the final regulations to constitute compliance with the ACA's 90-day waiting period limit.

RELATION TO EMPLOYER SHARED RESPONSIBILITY PENALTY

Under ACA's employer shared responsibility, or "pay or play" requirements, applicable large employers that do not offer health coverage to their full-time employees that is affordable and provides minimum value may be subject to a penalty. This penalty, effective for most employers beginning in 2015, is also called a "shared responsibility payment" under ACA.

On Feb. 12, 2013, the IRS published final regulations that address ACA's employer shared responsibility provisions. Under these regulations, there are times when an employer will not be subject to a penalty with respect to an employee although the employer does not offer coverage to that employee during that time. However, the fact that an employer will not owe a penalty under the employer mandate for failing to offer coverage during certain periods of time does not, by itself, constitute compliance with the 90-day waiting period limit during that same period.

The employer shared responsibility final regulations provide that an employer will not be subject to a pay or play penalty with respect to an employee for not offering coverage to the employee during a period of three full calendar months, beginning with the first day of the first full calendar month of employment (if, for the calendar month, the

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employee is otherwise eligible for coverage under the employer's group health plan). For this rule to apply, the employee must be offered coverage no later than the first day of the fourth full calendar month of employment (if the employee is still employed on that day) and the coverage must provide minimum value.

However, if a large employer subject to ACA's shared responsibility penalty denies coverage to a full-time employee based on a substantive eligibility condition, such as being in an eligible job classification, the employer may be subject to a penalty under the ACA. Also, although a cumulative hours-of-service requirement up to 1,200 hours may be permissible under ACA's 90-day limit on waiting periods, denying coverage to full-time employees while they accumulate the necessary number of hours of service may trigger an employer penalty for large employers.

EXAMPLES

The following examples help explain the rules related to the ACA's 90-day waiting period limit.

Example 1—General Rules

Facts—A group health plan provides that full-time employees are eligible for coverage under the plan. Employee A begins employment as a full-time employee on Jan. 19.

Conclusion—Any waiting period for A would begin on Jan. 19, and may not exceed 90 days. Coverage under the plan must become effective no later than April 19 (assuming February lasts 28 days).

Example 2—Eligibility Condition Related to Job Classification

Facts—A group health plan provides that only employees with job title M are eligible for coverage under the plan. Employee B begins employment in job title L on Jan. 30.

Conclusion—B is not eligible for coverage under the plan, and the period while B is working with job title L, and therefore not in an eligible class of employees, is not part of a waiting period under the ACA's 90-day waiting period limit.

Example 3—Change In Job Classification to Become Eligible

Facts—Same facts as Example 2, except that B transfers to a new position with job title M on April 11.

Conclusion—B becomes eligible for coverage on April 11, but for the waiting period. Any waiting period for B begins on April 11 and may not exceed 90 days; therefore, coverage under the plan must become effective no later than July 10.

Example 4—Eligibility Condition Related to Achieving Job-related Licensure Requirements

Facts—A group health plan provides that only employees who have completed specified training and achieved specified certifications are eligible for coverage under the plan. Employee C is hired on May 3 and meets the plan's eligibility criteria on Sept. 22.

Conclusion—C becomes eligible for coverage on Sept. 22, but for the waiting period. Any waiting period for C would begin on Sept. 22, and may not exceed 90 days; therefore, coverage under the plan must become effective no later than Dec. 21.

Example 5—Eligibility Condition Based Solely on the Lapse of Time

Facts—A group health plan provides that employees are eligible for coverage after one year of service.

Conclusion—The plan's eligibility condition is based solely on the lapse of time and, therefore, is impermissible under the ACA's 90-day waiting period limit because it exceeds 90 days.

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Example 6—Employee Taking Additional Time to Elect Coverage

Facts—Employer V 's group health plan provides for coverage to begin on the first day of the first payroll period on or after the date an employee is hired and completes the applicable enrollment forms. Enrollment forms are distributed on an employee's start date and may be completed within 90 days. Employee D is hired and starts on Oct. 31, which is the first day of a pay period. D completes the enrollment forms and submits them on the 90th day after D's start date, which is Jan. 28. Coverage is made effective 7 days later, Feb. 4, which is the first day of the next pay period.

Conclusion—Under the terms of V's plan, coverage may become effective as early as Oct. 31, depending on when D completes the applicable enrollment forms. Under the terms of the plan, when coverage becomes effective depends solely on the length of time taken by D to complete the enrollment materials. Therefore, under the terms of the plan, D may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, and the plan complies with the ACA's 90-day waiting period limit.

Example 7—Variable-Hour Employees

Facts— Under Employer W's group health plan, only employees who are full-time (defined under the plan as regularly averaging 30 hours of service per week) are eligible for coverage. Employee E begins employment for Employer W on Nov. 26 of Year 1. E's hours are reasonably expected to vary, with an opportunity to work between 20 and 45 hours per week, depending on shift availability and E's availability. Therefore, it cannot be determined at E's start date that E is reasonably expected to work full-time.

Under the terms of the plan, variable-hour employees, such as E, are eligible to enroll in the plan if they are determined to be a full-time employee after a measurement period of 12 months that begins on the employee's start date. Coverage is made effective no later than the first day of the first calendar month after the applicable enrollment forms are received. E's 12-month measurement period ends Nov. 25 of Year 2. E is determined to be a full-time employee and is notified of E's plan eligibility. If E then elects coverage, E's first day of coverage will be Jan. 1 of Year 3.

Conclusion—The measurement period is permissible because it is not considered to be designed to avoid compliance with the 90-day waiting period limit. The plan may use a reasonable period of time to determine whether a variable-hour employee is a full-time employee, provided that:

- The period of time is no longer than 12 months;
- The period of time begins on a date between the employee's start date and the first day of the next calendar month (inclusive);
- Coverage is made effective no later than 13 months from E's start date plus, if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month; and
- In addition to the measurement period, no more than 90 days elapse prior to the employee's eligibility for coverage.

Example 8—Cumulative Hours-of-Service Requirement

Facts—Employee F begins working 25 hours per week for Employer X on Jan. 6 and is considered a part-time employee for purposes of X's group health plan. X sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. F satisfies the plan's cumulative hours of service condition on Dec. 15.

Conclusion—The cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limit. Accordingly, coverage for F under the plan must begin no later than the 91st day after F completes 1,200 hours. (If the plan's cumulative hours-of-service requirement

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was more than 1,200 hours, the requirement would be considered to be designed to avoid compliance with the 90-day waiting period limitation.)

Example 9—Multiemployer Plan

Facts—A multiemployer plan operating pursuant to an arms-length collective bargaining agreement has an eligibility provision that allows employees to become eligible for coverage by working a specified number of hours of covered employment for multiple contributing employers. The plan aggregates hours in a calendar quarter and then, if enough hours are earned, coverage begins the first day of the next calendar quarter. The plan also permits coverage to extend for the next full calendar quarter, regardless of whether an employee's employment has terminated.

Conclusion—These eligibility provisions are designed to accommodate a unique operating structure, and, therefore, are not considered to be designed to avoid compliance with the 90-day waiting period limitation, and the plan complies with this section.

Example 10—Rehired Employee

Facts—Employee G retires at age 55 after 30 years of employment with Employer Y with no expectation of providing further services to Employer Y. Three months later, Y recruits G to return to work as an employee providing advice and transition assistance for G's replacement under a one-year employment contract. Y's plan imposes a 90-day waiting period from an employee's start date before coverage becomes effective.

Conclusion—Y's plan may treat G as newly eligible for coverage under the plan upon rehire and therefore may impose the 90-day waiting period with respect to G for coverage offered in connection with G's rehire.

Example 11—Reasonable and Bona Fide Employment-based Orientation Period

Facts—Employee H begins working full time for Employer Z on Oct. 16. Z sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a one-month orientation period. H completes the orientation period on Nov. 15.

Conclusion—The orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than Feb. 14, which is the 91st day after H completes the orientation period. (If the orientation period was more than one month, it would be considered to be considered a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the ACA's 90-day waiting period limit rules.)

Source: Departments of Labor, Health and Human Services and the Treasury

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